93-26

Supreme Court, U.S.
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CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

CARL J. DUNCAN,

Plaintiff,

v.

WARREN H. COBB,
JACQUELINE R. GRIFFIN,
CHARLES M. HARRIS,
EARLE W. PETERSON, JR.,
and WINIFRED J. SHARP,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

On a motion to dismiss pursuant to Rule 12(b)(1), Fed.R.Civ.P., may a federal district court contrary to law deny due process and equal protection in order to grant an improper and illegal affirmative defense?

May the affirmative defense that district courts are barred to review final state court decisions be premised on known and admitted null and void non-final state court orders?

Does the affirmative defense that a federal district court is barred to review final state court decisions bar the district court from viewing the record(s) of state court actions to see if the decisions are valid and final in order to determine its own jurisdiction?

May a federal district court seek grounds to deny the jurisdiction vested in it by Acts of Congress in order to keep from hearing and determining an action Congress ordered it to determine but over which the district court seemingly has no desire to conduct?

May a federal court of appeals sanction a departure from the usual course of judicial proceedings and a departure from the essential requirements of law, the results(s) of which inflict irreparable harm on the injured party?

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Duncan v. Duncan, Case No. 89-12080-FD-D
Eighteenth Judicial Circuit (Brevard County, Florida)
ORDER OF DISMISSAL dated March 29, 1991

Duncan v. Duncan,
571 So.2d 482 (Fla. 5th DCA 1990)

Duncan v. Cowart,
584 So.2d 997 (Fla. 1991)

Duncan v. Duncan,
590 So.2d 427 (Fla. 5th DCA 1991)

Duncan v. Cobb, et al.,
92-139-CIV-ORL-19 (unpublished order)

JURISDICTIONAL STATEMENT

The "PER CURIAM: AFFIRMED" without opinion order of the United States Circuit Court of Appeals for the Eleventh Circuit was entered April 2, 1993. There was no motion for rehearing. This Court has jurisdiction pursuant to the Act of June 27, 1988, Public Law 100-352, 102 Statute 662, United States Code, Title 28, Section 1254(1).

LEGAL AUTHORITIES INVOLVED

"The Congress shall have power: * * * To constitute tribunals inferior to the Supreme Court." Art. I S. 8.(9), U.S. Const.

"The Congress shall have power * * * To make rules for the government...." Art. I S. 8.(14), U.S. Const.

"The Congress shall have power * * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Art. I S. 8.(18), U.S. Const.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Art. III S. 1, U.S. Const.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, and laws of the United States... ." Art. III S. 2.(1), U.S. Const.

"In all cases ... in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exception, and under such regulations as the Congress shall make." Art. III S. 2.(2), U.S. Const.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every State shall be bound thereby... ." Art. VI(2), U.S. Const.

"Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." Amend. 1, U.S. Const.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amend. 14 S. 1, U.S. Const.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws ... of the United States." Act of Dec. 1, 1980, Pub. L. 96-486, S. 2(a), 94 Stat. 143, U.S.C., Title 28, s. 1331.

Act of Dec. 29, 1979, Pub. L. 96-170, s. 2, 93 Stat. 1284, U.S.C., Title 28, s. 1343. (See Appendix)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Act of Dec. 29, 1979, Pub. L. 96-170, 93 Stat. 1284, U.S.C., Title 42, s. 1983.

"[I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State ... with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person ... to the equal protection of the laws;

"If two or more persons in any State ... conspire ... for the purpose of depriving, either directly or indirectly, any person ... of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth

in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery or deprivation, against any one or more of the conspirators." Act of 1979, Pub. L. 96-170, 93 Stat. 1284, U.S.C., Title 42, s. 1985(2)&(3).

PRELIMINARY STATEMENT

The petitioner is referred to as C. DUNCAN or the plaintiff and the respondents as the defendants. This is consistent with their designations in the district and circuit courts.

STATEMENT OF THE CASE

On February 11, 1992 C. DUNCAN, plaintiff, non-attorney pro se, filed in the United States District Court for the Middle District of Florida, Orlando Division a complaint against five judges of the Florida Fifth District Court of Appeal seeking mandatory injunctive relief for civil rights violations under the authority of the Act of 1871, Public Law 96-170, 93 Statute 1284, United States Codes, Title 42, Sections 1983 and/or 1985.

The plaintiff contended that the defendants refused to issue valid judgments and were denying his civil rights by issuing non-final null and void orders in violation of law. He stated numerous reasons. The defendants did not file an answer but did move for dismissal on grounds of judicial immunity, Eleventh Amendment Bar and lack of subject matter in that a federal district court is barred to review final decisions of state courts. (APPENDIX 6).

The plaintiff opposed the motion to dismiss and filed motions for separate trials and for a default on grounds that the defendants were challenging the court's authority to hear the action under Section 1983 but raised no objection to Section 1985 nor did they defend or answer that authority. The plaintiff also moved for an evidentiary hearing. The defendants did oppose the first two motions.

The district court denied the defenses of judicial immunity and Eleventh Amendment Bar but granted the defense of lack of subject matter jurisdiction on grounds it cannot review final state court decisions. (APPENDIX 2). The plaintiff moved for rehearing which was denied. (APPENDIX 3). The plaintiff then appealed.

On appeal the plaintiff noted that the defendants and the court by law must take as truth all averments of the complaint; that the trial court judge could not accept citations in West's Florida Cases as better evidence than the original or verified, conformed copy

thereof pursuant to law; that citations in West's Florida Cases does not give validity to null and void decisions; that the lower court is barred by the United States Supreme Court to enforce null and void orders or judgments; that a motion to dismiss is by law limited to the four-corners of the complaint and may not be extended to unwarranted affirmative defenses or the introduction of external evidence; that the plaintiff is entitled to an evidentiary hearing to defend against an affirmative defense if he asks for it; and that the court could not refuse to hear an action authorized by an Act of Congress.

The defendants argued that the district court did not err by dismissing the action for the reasons stated in the order. The appellate court affirmed the lower court's decision. (APPENDIX 1).

ARGUMENT

The plaintiff seeks certiorari of the decision of the United States Eleventh Circuit Court of Appeals (APPENDIX 1) on grounds the circuit court has authorized a district court to veer from the accepted and usual course of judicial proceedings to an extent as to constitute a departure from the essential requirements of law thus denying due process, equal protection and other privileges and immunities guaranteed to the plaintiff which has resulted in irreparable harm if not redressed; and because the decisions of both the district and circuit courts are in conflict with law and precedence of the Supreme Court of the United States.

As noted in the complaint, the defendants knew at the time the initial brief was filed in Duncan v. Duncan, 571 So.2d 482 (Fla. 5th DCA 1990) that when the petitioner in the original state court action had attempted to enforce the "final judgment", C. Duncan had beaten it back by proving the judgment was null and void ab initio for want of subject matter jurisdiction and that the trial court had estopped all further attempts to enforce the judgment by declaring it satisfied notwithstanding it allowed withdrawal of the motion for contempt. (APPENDIX 4). This the defendants also knew because the state trial court judge later refused to vacate the

judgment since the defendants had illegally affirmed it but also refused again to allow its enforcement because the trial court never had subject matter jurisdiction. (APPENDIX 5). In Duncan v. Duncan, 590 So.2d 427 (Fla. 5th DCA 1991) the defendants were not only aware of all this but they were also aware that the Florida Supreme Court had seen all this, agreed that the state trial court judgment was null and void ab initio and the state trial court never had jurisdiction, had authorized federal attack and why it had done so, was aware that pursuant to Miller v. Fortune Insurance Co., 484 So.2d 1221, 1224 (Fla. 1986) they were compelled to reverse the lower court's refusal to entertain a motion for relief and that pursuant to Hoffman v. Jones, 280 So.2d 431 (Fla. 1975) this was a mandatory ministerial duty and not a discretionary function.

From the foregoing, the preceding Statement of the Case, and the orders of the district court (APPENDIX 2) and the circuit court (APPENDIX 1), it should be quite clear as to what happened. Since the defendants did not file an answer, they waived the right to raise affirmative defenses and estopped themselves from so doing. However, that is exactly what they did!

Affirmative defenses can only be raised when joined to and included in a pleading. A motion is not a pleading! Rule 8(c), Fed.R.Civ.P., says "In pleading to a preceding pleading, a party shall set forth" the cited defenses "and any other matter constituting an avoidance or affirmative defense." On the other had Rule 12(b), Fed.R.Civ.P., clearly allows for the filing of any one or more specifically stated defenses in a responsive motion in lieu of an answer, but such is limited specifically to those enumerated defenses.

A look at the defendants' motion to dismiss filed in the district court shows that it contains three affirmative defenses and no defenses cited under Rule 12(b). (APPENDIX 6). The defenses cited in numbered paragraphs one and three are on their faces affirmative defenses of judicial immunity and Eleventh Amendment Bar. However, the district court's order says that the plaintiff defeated these on the merits in that it specifically denies the defense of judicial immunity and implies denial of the defense of Eleventh Amendment bar by omission of any verbiage granting it.

This was not appealed by the defendants or the plaintiff and is now moot. (APPENDIX 2).

What the district court erroneously granted and the circuit court affirmed was paragraph 2 of the defendants motion to dismiss which in fact is the affirmative defense of bar to review a final state court decision but which was deceptively labelled as "lack of subject matter jurisdiction" with the apparent intent to mislead the courts.

This Court in Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) defined lack of subject matter jurisdiction. It said that in determining such the court must find that none of the following criteria apply: (1) the cause is not one arising under the Federal Constitution, laws or treaties; (2) the complaint shows that it is not a "case or controversy" within the meaning of the laws as stated in question number one; and, (3) the cause is not described by any jurisdictional statute. That IS the controlling test!

In Baker, U.S. at 199 the court said,

> Dismissal of the complaint upon the ground of lack of jurisdiction of the subject would, therefore, be justified only if that claim were "so attenuated and unsufficient as to be absolutely devoid of merit," Newburyport Water Co. v. Newburyport, 193 U.S. 561, 576, or "frivolous", Bell v. Hood, 327 U.S. 678, 683. That the claim is unsubstantiated must be "very plain," Hart v. Keith Vauderville Exchange, 262 U.S. 271, 274.

This is in accord with other rulings made by this Court on motions to dismiss. In Polk Co. v. Glover, 305 U.S. 5, 9 - 19, 59 S.Ct. 15, 17 - 21, 83 L.Ed. 6, 10 - 16 (1938) this Court held that a motion to dismiss must be denied if it asks the court to dispose of fact raised by the pleadings in advance of trial in due course. Surely due process was denied when the trial court granted validity to state court decisions known to be null and void. In Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1970) this Court held that on a motion to dismiss the judge accept as truth the validity of the allegations of the complaint even if he believes the plaintiff will not prevail at a trial on the merits. This

Court still held this true in Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163, 170 (1980), citing Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972).

In Peoples Natural Gas Co. v. Federal Power Comm., 127 F.2d 153, 157 supra, 75 U.S. App. DC 235 (1942), certiorari denied, 316 U.S. 700, 62 S.Ct. 1298, 86 L.Ed. 1769 the court held that where there are multiple grounds for jurisdiction cited and the defendants do not plead to, deny or challenge each and everyone of them, they admit that the court has jurisdiction under those not challenged. The rationale appears to be that if the court is given authority to hear the merits, it will find that it does have jurisdiction.

In the matter before the district court, the defendants challenged only 42 United States Code Section 1983 so ceded that the district court has jurisdiction under 42 United States Code Section 1985. Further, the defendants argued that the district court could not review final state court decisions but did not argue the issues raised in Baker v. Carr, Id. As such they did not challenge subject matter jurisdiction but attacked the merits which they had already conceded and admitted were true, to-wit: that the state district court of appeal orders are null and void and non-final. As such they admitted that there was no bar to the court's jurisdiction. This is consistent with federal precedence that null and void judgments may not be enforced. Elliott v. Piersol, 1 Pet. 328, 340, 7 L.Ed. 164, 170 (1828); Thompson v. Tolmie, 2 Pet. 157, 161 & 167, 7 L.Ed. 381, 383 & 385 (1829). Granting a bar on null and void judgments is a violation of law. Elliott v. Piersol, Id. This the court must have found out for itself.

The defendants and the district court also appear to have felt that when C. Duncan went to the Florida Supreme Court on a petition for writ of mandamus in Duncan v. Cowart, 584 So.2d 597 (Fla. 1991), such was an appeal notwithstanding that both Florida and federal practice consider such to be a collateral attack. They also argue that the refusal of the Florida Supreme Court to decide the issue amounts to a ruling on the merits that the Florida Supreme Court upholds subversion of the United States Constitution in that it supports civil rights violations. This is a pretty heavy statement and assumption for the district court to make and the circuit court

to uphold without first viewing the record and finding out for itself when the plaintiff claims it is merely a sanction for federal intervention; not to mention it is a ruling on the merits contrary to the requirement that both the defendants and the district court admitted that the averments in the complaint were true. It is also contrary to this Court's constant rulings that actions under United States Code, Title 42, Sections 1983 and 1985 are supplementary to state court actions and refusal of a state court to decide an issue thereunder amounts to a sanctioning for the federal district courts to exercise their original jurisdiction. McNeese v. Board of Education, 373 U.S. 668, 671 - 72, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

Here, again, are seen affirmative defenses to which the plaintiff was entitled to present evidence to refute, particularly when he timely requested it. The plaintiff submits that failure to stick to usual procedure and failure to grant an evidentiary hearing are a violation of due process and equal protection. This Court upheld such in Smart v. Jones,530 F.2d. 64, 65 (5th Cir. 1976), rehearing denied, 532 F.2d 1375, 1376, certiorari denied, 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168, rehearing denied, 429 U.S. 1125, 97 S.Ct. 1166, 51 L.Ed.2d 576 where it was determined that during preliminary proceedings it is proper to allow viewing of state court records "as a means of eliminating possible fact issues."

The plaintiff submits that in both this matter and the action in the district court he is entitled to a hearing or trial on the merits. Amendment 1 of the Constitution of the United States says, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievance." which implies that the petition must be tried on the merits. Such is based in law in that it is Congress and Congress alone which has the power to make all laws necessary to carry out the provision of the Constitution. Art. I S. 8(18). That even applies to court rules: "The Congress shall have power * * * To make rules for the government... ." Art. I S. 8(14), U.S. Const.

Thus when Amendment 14 Section 1 of the United States Constitution grants specific rights such as in the privileges and

immunities clause, the due process clause, and the equal protection clause those rights may not be abridged. To enforce those rights Congress enacted Title 42, United States Code, Sections 1983 and 1985 and it gave the district courts original jurisdiction to hear actions pursuant to Title 28, United States Code, Section 1331 and 1343.

Further, it is Congress who constituted the tribunals inferior to the Supreme Court. Art. I S. 8(9), U.S. Const. And the judicial power is vested both in those inferior courts and the Supreme Court. Art. III S. 1, U.S. Const. The Constitution and the federal law are the supreme law of the land and no state judge may violate it. Art. VI(2), U.S. Const. This Court is in like accord because in Baker at U.S. 200 the court held that violation of a part of the Federal law or Constitution does provide federal jurisdiction to a district court as "defined in Art. III, S. 2, and so within the power of Congress to assign to the jurisdiction of the District Courts."

For these reasons the plaintiff submits that pursuant to Supreme Court Rule 16.1 this Court should summarily reverse on the merits the order of the United States Court of Appeals and remand with instructions to order the district court to reinstate the case and proceed with the issues; alternatively, that pursuant to Supreme Court Rule 16.2 this Court should grant certiorari to allow for further development of these issues and a full determination on the merits.

Respectfully submitted,

Carl J. Duncan
Pro Se